INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of argument	9
Argument	13
I. The Government may properly assert in a single proceeding both its existing rights to property and its right to condemn any interests found to be outstanding	13
A. Introduction	13
B. The issue is one of federal law	15
C. The decision below is erroneous	19
II. The lease was subject to revocation in order to use the property for an Army missile base	30
A. Introduction	30
B. The revocation was authorized by the terms of the lease	32
C. The lease was revocable under the authorizing statute	34
Conclusion	38

CITATIONS

Cases:	
Albrecht v. *United States*, 329 U.S. 599	29
Ann Arbor Transp. v. *United States*, 93 F. Supp. 341	34
Bibb County v. *United States*, 249 F. 2d 228	30
Conley v. *Gibson*, 355 U.S. 41	21
Danforth v. *United States*, 308 U.S. 271	12, 29
Duckett & Co. v. *United States*, 266 U.S. 149	28
Eagle Lake Improvement Co. v. *United States*, 160 F. 2d 182, certiorari denied, 332 U.S. 762	22, 28
Fourco Glass Co. v. *Transmirra Corp.*, 353 U.S. 222	19

Cases—Continued

	Page
Hingham Management Corp. v. *United States*, 166 F. Supp. 615	36
Kogod v. *Stanley Co. of America*, 186 F. 2d 763	33
Mahowald v. *United States*, 176 F. 2d 509	29
National Refining Co. v. *United States*, 160 F. 2d 951	22
Phillips Petroleum Co. v. *Johnson*, 71 F. Supp. 791	34
Scott v. *United States*, 161 F. 2d 1009	29
Searl v. *School District, Lake County*, 133 U.S. 553	30
Tennessee v. *United States*, 256 F. 2d 244	28
Todd Dry Dock & Constr. Corp. v. *Sumner Iron Works*, 289 Fed. 217, certiorari denied, 263 U.S. 700	35
United States v. *Carmack*, 329 U.S. 230	29
United States v. *Certain Land*, 345 U.S. 344	29
United States v. *Certain Parcels of Land in Philadelphia*, 144 F. 2d 626	18
United States v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, certiorari denied, 302 U.S. 714	23
United States v. *Dow*, 357 U.S. 17	14
United States v. *Dunnington*, 146 U.S. 338	15
United States v. *11.48 Acres of Land*, 212 F. 2d 853	23
United States v. *Miller*, 317 U.S. 369	18
United States v. *San Geronimo Development Co.*, 154 F. 2d 78, certiorari denied, 329 U.S. 718	11, 25-27
United States v. *10,245 Acres of Land*, 50 F. Supp. 470	27
United States v. *Turner*, 175 F. 2d 644	11, 24-25
United States v. *Two Acres of Land, etc.*, 144 F. 2d 207	29
Wilson v. *Towers*, 55 F. 2d 199	33
Wittmayer v. *United States*, 118 F. 2d 808	27

Statutes and Rules:

Act of August 18, 1890, 26 Stat. 316	16
Act of August 29, 1916, 39 Stat. 556, 34 U.S.C. (1946 ed.) 522	2, 34, 35, 36
Act of August 5, 1947, § 1, 61 Stat. 774, 34 U.S.C. 522a	2, 32, 34, 35, 36
Act of August 10, 1956, 70A Stat. 1, § 49(a)	18
Act of September 2, 1958, 72 Stat. 1437, *et seq.*, §§ 33(a)(14) and 33(g)	10, 19
Surplus Property Act of 1944, 58 Stat. 765, *et seq.*, §§ 3(e), 4, 11, 23	32
63 Stat. 384, 40 U.S.C. 483(c)	34

Statutes and Rules—Continued

	Page
10 U.S.C. (Supp. V) 2663	18, 19
28 U.S.C. 2072	17
40 U.S.C. 255	29
50 U.S.C. 171	10, 16, 17, 19
Federal Rules of Civil Procedure:	
Rule 2	21
Rule 71A	10, 17, 18, 19, 24
Rule 81(a)(7)	16, 17
Miscellaneous:	
93 Cong. Rec. 9797–9799, 10,492	37
102 Cong. Rec. 4121, 13944, 13952	19
H. Doc. 121, 82d Cong., 1st Sess., pp. 18–20, 21, 25–26; 28 U.S.C., pp. 4358, 4359, 4360	17
H. Rep. 623, 80th Cong., 1st Sess.	37
S. Rep. 626, 80th Cong., 1st Sess.	37
S. Rep. 2095, 85th Cong., 2d Sess.	19
S. Rep. 2484, 84th Cong., 2d Sess.	19

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 460–479) is reported at 258 F. 2d 17.

JURISDICTION

The judgment of the court of appeals (R. 480) was entered July 15, 1958. On October 4, 1958, an order was entered by Mr. Justice Clark extending the time for filing a petition for a writ of certiorari to and including December 12, 1958. The petition was filed on December 11, 1958, and was granted on January 26, 1959 (R. 481). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action to condemn "any" interest remaining in a lessee of Government property, the Government is estopped to assert that the lessee has no interest in the property because the lease was revoked.

2. Whether a lease of a Navy airfield which provided that it could be revoked upon a determination that "such revocation is essential," and which was entered into under a statute requiring that such leases be revocable "at any time," could be revoked upon a determination that the property was needed for an Army missile site.

STATUTES INVOLVED

The Act of August 29, 1916, 39 Stat. 556, 559, 34 U.S.C. (1946 ed.) 522, provided in part:

> LEASE OF NAVAL LANDS: That authority be, and is hereby, given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: * * *.

The Act of August 5, 1947, § 1, 61 Stat. 774, 34 U.S.C. 522a, provides in part:

> That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is author-

ized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. * * *

STATEMENT

On October 6, 1954, the Government filed a complaint in the United States District Court for the

Northern District of Illinois seeking to acquire by condemnation any outstanding interests in the United States Naval Outlying Airfield, located near Chicago (R. 9–12). Respondent, which was operating the property as an airport, claimed that it held the property under a lease from the Government and that it was entitled to compensation for the taking of its leasehold interest. The Government claimed that the lease had been revoked and denied that respondent had any interest in the property. Both the district court and the court of appeals upheld respondent's claim. The relevant facts are as follows:

On May 2, 1947, the United States and respondent executed a lease of the airfield providing in part as follows (R. 12–23):

* * * * *

> Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and
>
> * * * * *
>
> Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government.
>
> Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * [hereby leases the airfield to Lessee, for use as an airport, for a five-year term ending May

1, 1952], unless sooner terminated as hereinafter provided and subject to the following conditions and covenants:

1. This lease may be terminated by the Government as hereinafter provided. Further, this lease may be terminated by the Lessee at any time after presentation of a written notice to the Government not less than sixty (60) days prior to its intention to so terminate. It is agreed that the term of this lease may be renewed by the Lessee for an additional period of five years upon the same terms and conditions as set forth herein provided that in the opinion of the Secretary of the Navy the premises are not essential for governmental purposes only.

* * * * *

14. It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

* * * * *

The lease was extended under paragraph 1 for an additional five-year term, to run until May 1, 1957 (R. 24).

In April 1954, jurisdiction over the property was transferred from the Department of the Navy to the Department of the Army (R. 11, 436), which needed the property for use as an aerial defense missile (NIKE) site (R. 46). Respondent was notified of

the transfer and tendered rental to the new agency designated (R. 28, 29). On July 27, 1954, a notice of revocation of the lease under paragraph 14, signed by both the Secretary of the Army and the Secretary of the Navy, was delivered to respondent (R. 11, 23–25). The notice recited that a state of national emergency had been declared by the President on December 16, 1950, that possession of the property "is required for military purposes," and that both Secretaries had determined that "revocation of the said lease is essential." The notice stated that the lease "is hereby revoked, effective September 27, 1954", and demanded that respondent vacate the premises by that date (R. 23–25).

Respondent refused to surrender possession of the property, claiming that the lease could be revoked only for the purpose of using the property for "Naval Aviation activities," within the meaning of the preamble of the lease, and could not be revoked in order to use the property for an Army missile site.[1]

To obtain immediate possession, the Government, on October 6, 1954, instituted this condemnation action. The complaint (R. 9–12), to which a copy of the lease and of the notice of revocation was appended (R. 12, 23), recited that the lease had been revoked but that respondent refused to vacate the property and was "claiming an interest" therein. The complaint sought

[1] On August 10, 1954, respondent filed a complaint against the United States and the Secretaries of the Army and the Navy, seeking a declaratory judgment that the revocation was ineffective for that reason, but the complaint was voluntarily withdrawn on August 23, 1954, after the Government had asserted a lack of jurisdiction over the parties.

to acquire by condemnation "any possessory rights" in the property and, in particular, "all remaining outstanding right, title and interest, if any, of" respondent. The prayer was that the property be condemned, that an order be entered granting the Government immediate possession, and that "just compensation, if any" be determined and awarded. An order granting the United States possession of most of the property was entered on the same day (R. 26–27, 39). Construction of the project commenced within a few days.

Respondent answered the complaint, seeking just compensation for the remaining term of the lease (about 2 years and 8 months) (R. 27). By motions to strike respondent's answer and for summary judgment, the Government asserted that the lease had been revoked and that respondent therefore had no interest in the property. Both motions were denied and the case was set for a jury trial on the issue of valuation (R. 38–42). At the trial the court ruled that the Government, having elected to condemn respondent's leasehold interest, could not assert that the lease had been terminated, and that the only issue to be tried was the valuation of the remaining term of the lease (R. 49–50, 67–68, 73, 93–94).

At the close of the trial, the Government moved for a directed verdict of no compensation, but the motion was denied (R. 386). The court (over timely objections) instructed the jury that the lease had not been canceled and was still in effect at the date of the taking; that in determining the value of the remain-

ing term of the lease the jury could take into account the fact that it was subject to future revocation under paragraph 14 but that it could be so revoked only upon a determination that revocation was "essential for aviation purposes"; and that the use of the property as a NIKE site was not an "aviation use" within the meaning of the lease (R. 421–422).

The jury returned a verdict finding just compensation for respondent's leasehold to be $25,000, and judgment was entered accordingly (R. 442). The Government's motion for judgment notwithstanding the verdict was denied (R. 443–444). Respondent's motion for additur or, in the alternative, for a new trial on the ground of insufficiency of the verdict was granted, and, upon supplemental findings by the court that respondent was entitled to an additur of $50,000, an amended judgment was entered awarding respondent $75,000, plus interest from the date of taking (R. 446–448).

On appeals taken by both parties, the court of appeals held that the district court was without authority to allow additur and remanded the case with directions either to enter judgment on the jury's verdict or to grant the alternative motion for a new trial. On all other issues, the court, by a divided vote, affirmed the district court (R. 460–475). It held that the Government had "elected" to condemn respondent's leasehold interest rather than pursue its remedies to obtain possession under the revocation and that the Government's reliance on the revocation "was entirely inconsistent with its condemnation complaint," since "In the same breath, the Government

proclaimed and denied defendant's ownership of the leasehold estate" (R. 472). The court accordingly refused to determine whether the revocation notice of July 27, 1954, had been effective to terminate the lease.

On the question of the effect of paragraph 14 on the value of the remaining term of the lease, the court held that that paragraph should be read in the light of the preamble and that, so read, the requirement in paragraph 14 of a determination that "revocation is essential" required a determination that it was essential "for aviation purposes." The court also rejected the argument that the authorizing statute required such leases to be revocable at any time, stating that it was "not convinced" that the statute supported the contention; that it "passes all credulity" that Congress so intended; and that it could be assumed that the Government acted in accordance with the statute when it prepared the lease (R. 473–474). In view of its first holding that the prior revocation was irrelevant, the court did not reach the Government's alternative contention that use of the property for a missile site ("aircraft" of a sort) was a proper reason for revocation even under the court's construction of the lease (R. 475).

SUMMARY OF ARGUMENT

I

A. The Government, needing (for use as a missile base) property previously leased to respondent, revoked respondent's lease, but respondent, claiming the revocation was invalid, refused to give up possession. To obtain immediate possession, the Government then filed a complaint in a condemnation

proceeding, alleging that respondent had no interest in the property but seeking to acquire for the Government whatever interest respondent still possessed. The courts below held that the Government was estopped to deny respondent's title and was required to pay it just compensation for the value of the remainder of the lease term regardless of the validity of the prior revocation. The question is whether the Government may assert in a single proceeding both its existing rights to property and its right to condemn any interests found to be outstanding.

B. The question is governed by federal law. The provision of the military purposes condemnation statute (50 U.S.C. 171) requiring conformity with state procedure was superseded in 1951 by Rule 71A of the Federal Rules of Civil Procedure. The reenactment of the conformity provision in the 1956 codification of military laws into Title 10 was obviously inadvertent. The codification was not intended to effect any substantive change, and could not in any event alter the effect of the complaint filed in this action in 1954. The conformity provision, moreover, was retroactively deleted from Title 10 by the Act of September 2, 1958, 72 Stat. 1437.

C. The decision below, requiring the Government first to litigate its existing claims to the property in independent proceedings and only then to condemn any interests outstanding, necessarily postponing its taking of possession in the meantime, would unduly hamper urgent programs requiring acquisition of property to which the Government asserts an existing right. In

addition, the resulting multiplicity of actions would impose unnecessary burdens both on the courts and the parties and would be inconsistent with the purposes of the Federal Rules. Since the Government will be entitled to possession (either by taking or by right), whatever the outcome of the respondent's claim, there is no practical obstacle to giving it immediate possession and resolving the question of respondent's interest in determining compensation. Such a procedure works no hardship on the condemnee, and neither the court below nor respondent has suggested any reason to require two proceedings instead of one.

The Government's claim simply put in issue the right to the property on the date of taking, and that issue is implicit in all condemnation proceedings. When the dispute over title is between private claimants to the property, it must admittedly be resolved by the condemnation court in awarding compensation, and the principle is no different when the dispute is between the Government and a private claimant: in either event, each claimant must prove his right or title in order to be entitled to compensation.

Of the cases involving title disputes between the Government and a condemnee, we know of none, not based on local procedure, which has ever denied the right of the Government to have its claims determined in the condemnation action, and the cases expressly discussing the question are squarely opposed to the decision below. *United States* v. *Turner*, 175 F. 2d 644 (C.A. 5); *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C.A. 1), certiorari denied, 329 U.S. 718.

The decision below is also inconsistent in underlying principle with the many cases recognizing the propriety of using condemnation, not to acquire an identified interest or to determine compensation, but simply to perfect a title acquired by a contract of purchase. *E.g., Danforth* v. *United States,* 308 U.S. 271.

II

The lease of the property, a former naval airfield, provided that it was "revocable at will" upon a determination by the Secretary "that such revocation is essential." The court of appeals held that the lease could be revoked only if the property were "essential for aviation purposes", which the district court held did not include use of the property as an army missile base. The sole basis for that interpretation was a "Whereas" clause in the preamble of the lease reciting that it was necessary to retain the property in "a stand-by status for post-war use in connection with Naval Aviation activities."

That interpretation of the lease is unsound. The "Whereas" clause was a recital of the justification for the Navy Department's keeping the property and leasing it rather than declaring it surplus and disposing of it; it was in no way related to the scope of the revocation clause. The revocation clause itself is unqualified and gave the Government the right to revoke for any governmental purpose.

The statute authorizing the lease, moreover, expressly requires that such leases be revocable "at any time." There is no basis for construing the statute as

conferring less than an absolute and unconditional right of revocation. Clearly, therefore, the revocation of the lease for the purpose of using the property for a missile base was valid, and respondent had no interest in the property at the date of the condemnation.

ARGUMENT

I

THE GOVERNMENT MAY PROPERLY ASSERT IN A SINGLE PROCEEDING BOTH ITS EXISTING RIGHTS TO PROPERTY AND ITS RIGHT TO CONDEMN ANY INTERESTS FOUND TO BE OUTSTANDING

A. INTRODUCTION

The Government needed property it had previously leased to respondent for use as a NIKE missile site. To obtain possession, it revoked the lease, claiming the right to do so under its terms and the authorizing statute. Respondent contended that the revocation was ineffective and refused to surrender possession. The validity of the revocation could have been determined by an action in ejectment or to quiet title, but the Government could not delay construction of the NIKE site for the months or years required to conclude such an action. Moreover, it was willing to take the property by eminent domain if it was not otherwise entitled to it. To obtain immediate possession, therefore, the Government filed a complaint and a motion for possession in a condemnation proceeding. The complaint, although alleging that the lease had been validly revoked (and hence that respondent had no remaining interest in the property), nevertheless sought to acquire whatever interest respondent might be found still to possess.

499822—59——3

The court below held that, by initiating a condemnation proceeding, the Government had foreclosed itself from asserting its rights under the revocation, and hence that respondent must be deemed entitled to compensation for the taking of the leasehold interest. In the court's view, the Government, if it wished to preserve its rights under the revocation, was required first to proceed by an independent action, such as ejectment, to obtain possession on that ground and only then, if that action was unsuccessful, initiate condemnation proceedings. Assuming that the revocation was valid, the court's holding in effect gave the Government the choice of either (*a*) paying for what already belonged to it or (*b*) postponing its taking of possession (and the installation of the NIKE site) until its ownership was established in independent proceedings.[2]

Such a bar to the Government's asserting in a single proceeding both its existing rights to property and its right to take any interests found to be outstanding would seriously hamper important governmental programs. Urgent projects requiring the acquisition of land to which the Government asserts

[2] We do not understand the suggestion of the court below (R. 471) that the Government might have obtained immediate possession by an action of ejectment, with the respondent then suing for compensation in the Court of Claims. In ejectment, possession could not have been obtained until after litigation of the merits, and if possession were so obtained there would be no basis for a suit in the Court of Claims. Apparently the court was referring to the Government's argument that it might have simply *seized* the property, under its powers of eminent domain, without benefit of judicial procedure. See *United States* v. *Dow*, 357 U.S. 17. If so, it may be that the decision leaves it open to the Government to follow that pro-

an existing interest would have to be delayed while that right is being litigated in independent proceedings. As this Court has said in a similar context, "Such a construction would be intolerable. The march of public improvement cannot thus be stayed by uncertainties, complications or disputes regarding the title to property sought to be condemned * * *." *United States* v. *Dunnington*, 146 U.S. 338, 350. The multiplicity of suits required under the decision below would, in addition, unnecessarily burden the courts and cause delay, inconvenience, and added expense to those claiming interests against the Government—who, like the Government, would be forced to protect their interests in two separate proceedings.

We shall show below (*infra*, pp. 19–30) that there is no reason—whether of policy, of logic, or of authority—for requiring such cumbersome procedures to be followed. There is, however, a preliminary question to be disposed of, *i.e.*, whether the issue is one of federal or of state law.

B. THE ISSUE IS ONE OF FEDERAL LAW

In the court of appeals and in its brief in opposition here, respondent contended that the question in

---

cedure and then to assert its existing right to the property as a defense in the suit for just compensation—though it is not clear why the exercise of the power of eminent domain in that manner would be any less an "election", under the theory of the court below, than its exercise by judicial proceedings. In any event, clearly no purpose would be served by forcing the Government, in such cases, to abandon the orderly judicial procedure established by Congress, with its numerous protections for the condemnee, in favor of the seizure method, leaving the property-claimant to a suit in the Court of Claims for his sole remedy.

this case was governed by state law under 50 U.S.C. (1952 ed.) 171. That section, dating from 1890 (26 Stat. 316), authorized the Secretary of the Army to institute condemnation proceedings to acquire property for military use and provided that "such proceedings [are] to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." That "conformity" provision has, however, been superseded by the Federal Rules of Civil Procedure.

1. Prior to the Federal Rules, of course, all civil actions in the federal courts were required to conform to local procedure under the general conformity statute. Consistently with that philosophy, the numerous condemnation statutes, including 50 U.S.C. 171, likewise required conformity with state procedure. When the Federal Rules were adopted in 1938 to provide a uniform federal procedure in all civil actions, no agreement was reached on the procedure to be followed in condemnation cases and, accordingly, condemnation proceedings were expressly excepted from the Rules by Rule 81(a)(7), which provided: "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable." In 1951, however, after several prior attempts to formulate a rule governing condemnation proceedings—the history of which is recited in the report of the Advisory

Committee[3]—Rule 81(a)(7) was deleted and Rule 71A, making the Federal Rules applicable to condemnation proceedings and prescribing the procedure to be followed in such cases, was adopted. 341 U.S. 962.

Rule 71A(a), as thus adopted and as in force when this proceeding was instituted, provides:

> The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

That the very purpose of that Rule was to provide a uniform federal procedure in condemnation cases in lieu of the diversity of state procedures required to be followed under the old conformity provisions is obvious, and the Advisor's notes, indeed, list 50 U.S.C. 171 among the statutes which occasioned the need for the Rule.[4] And since 28 U.S.C. 2072, in authorizing the Federal Rules, provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect," there can be no contention that Rule 71A was not effective to supersede the conformity provisions of the several condemnation statutes. Matters affecting the Government's substantive rights have always been

[3] H. Doc. 121, 82d Cong., 1st Sess., Appendix, pp. 18–20; 28 U.S.C. (1952 ed.), p. 4358.

[4] H. Doc. No. 121, 82d Cong., 1st Sess., Appendix, p. 21; 28 U.S.C. (1952 ed.), p. 4359. See also H. Doc. No. 121, Appendix, *supra*, at 25–26 (28 U.S.C. at p. 4360), noting that Rule 71A was not intended to supersede the substantive provisions of the various condemnation statutes, specifically including 50 U.S.C. 171, which "authorize the acquisition of title or the taking of immediate possession."

governed by federal law. *United States* v. *Miller*, 317 U.S. 369; *United States* v. *Certain Parcels of Land in Philadelphia*, 144 F. 2d 626 (C.A. 3). With the addition of Rule 71A, therefore, the supremacy of federal law was made complete, so that in federal condemnation proceedings all questions, whether of substance or of procedure, relating to the exercise of the federal power of eminent domain (as distinguished from questions of local property law, etc.), are now governed exclusively by federal law.[8]

2. Respondent's contrary contention is based primarily upon the 1956 re-enactment of the provisions of 50 U.S.C. 171, with minor word changes, as 10 U.S.C. (Supp. V) 2663, as part of the codification into a single title of the previously scattered laws governing the armed forces. The short and complete answer is that, even if Rule 71A had to that extent been superseded in 1956, it was nevertheless governing when the complaint in this case was filed in 1954—the only time when the Government may be charged with having made a choice of alternatives. It is clear, however, that the rephrasing and codification into one title of the numerous statutes replaced by Title 10 was not intended to effect any substantive change. Section 49(a) of the codifying statute expressly stated that "it is the legislative purpose to restate, without substantive change, the law replaced

[8] In our view, the issue in this case—whether the Government can, by condemnation, obtain immediate possession of property which it claims to own without sacrificing its claims of ownership—affects such substantial rights of the Government as to be a matter of "substance" which would have been governed by federal law even under the old conformity statutes.

by" Title 10.* Act of August 10, 1956, 70A Stat. 1, 640. Such a formal revision and recodification of existing statutes has no substantive effect. *E.g., Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227.

In any event, whatever the merits of the dispute when the case was before the court of appeals, the issue has now been resolved by Congress. By the Act of September 2, 1958, Congress retroactively amended 10 U.S.C. 2663 by deleting the conformity provision.. §§ 33(a)(14), 33(g), 72 Stat. 1437, 1565, 1568. The reasons given for the amendment were an express recognition that the conformity provisions of the old condemnation statutes had been superseded by Rule 71A and that the failure to omit that part of 50 U.S.C. 171 during its recodification was an oversight (S. Rep. 2095, 85th Cong., 2d Sess., p. 110):

> The deletion of the last sentence of section 2663(a) and the last sentence of section 2664 (a) reflects their implied repeal by Rule 71A of the Rules of Civil Procedure for the United States District Courts (see 28 U.S.C. 2072).

C. THE DECISION BELOW IS ERRONEOUS

The issue in this case is whether a court in a condemnation proceeding may determine to whom the

*See also S. Rep. 2484, 84th Cong., 2d Sess., pp. 15, 19; 102 Cong. Rec. 4121 (Notice of Hearings); 102 Cong. Rec. 13944 (Senator O'Mahoney, manager of the bill: "I wish it clearly understood that no change of substantive law is included in this measure. * * * it is simply a restatement of existing law"); 102 Cong. Rec. 13952 (Senator Wiley: "The committee * * * concluded that * * * [the bill] accurately reflects the presently existing military law, and that there is no reason to fear that any substantive change has been made.").

property taken belongs. The question of "election of remedies" elaborated by the court of appeals is a spurious issue. The notion underlying the decision below is the thought that it is somehow "repugnant" to reason for the Government to assert that it owns the property but, if not, that it is willing to pay for it. We shall show not only that the Government's alternative pleading was conceptually manageable but that it afforded an entirely appropriate procedure for the resolution of the dispute between the parties and posed no issues not traditionally involved in condemnation proceedings.

1. There is no reason in logic or as a matter of sound procedure why both the Government's existing rights to the property and its right to condemn any interest found still to exist in respondent should not be asserted in a single proceeding. Since the Government asserted not only its present ownership of the property, but also its right to take any interests that might be found to be outstanding, it was entitled to immediate possession, whatever the outcome of its full ownership claim. There was therefore no obstacle to granting immediate possession and reserving the questions of ownership for resolution in determining what, if any, compensation was owing to respondent.

In contrast to the obvious advantages of the procedure followed, the opinion of the court of appeals offers no reason, apart from the court's conceptual difficulties, for requiring two proceedings instead of one. Respondent, in its brief in opposition, suggests that

it is prejudiced by the procedure in that it is deprived of its "right" to remain in possession pending the final adjudication of an ejectment action (Br. Op., p. 4). But if respondent's claimed interest in the property is ultimately upheld in this action, the award of just compensation will, by definition, fully compensate it for its loss of possession. If it is held not to have had an interest, and hence is not awarded compensation, then by definition it had no "right" to possession of which it was deprived.

Lacking any justification in terms of policy or otherwise, the decision below can be explained only as a return to pleading concepts long ago rejected by the Federal Rules. Cf. *Conley* v. *Gibson,* 355 U.S. 41, 48. In substance, the court holds simply that there is no "form of action" (R. 471) in which the Government's right to employ condemnation to obtain immediate possession (subject to payment of just compensation for any interests owned by others) can be enforced while preserving its own rights of ownership. The complete answer, we submit, lies in Rule 2 of the Federal Rules of Civil Procedure: "There shall be one form of action to be known as 'civil action.'"

2. Even if the procedure followed by the Government in this case were unique, it would, for the reasons suggested above, be an entirely proper one. That procedure, however, is not at all unique and raises no issues not typically involved in condemnation proceedings. The revocation notice, if valid, was self-executing and operated of its own force to terminate respondent's interest in the property. Thus, the Gov-

ernment was asserting, not that it had a right to terminate the lease which could be exercised in the condemnation action, but that, at the date of condemnation, the lease had already been terminated so that respondent did not then have any interest in the property. The Government's contention, therefore, raised nothing more than the issue of right or title: to whom did the property belong on the date of taking?

a. The issue of right or title, though often not contested, is necessarily implicit in every condemnation proceeding, for the burden is on each claimant to prove his right or title, and thus his right to compensation. The issue of title is most frequently contested, of course, between opposing private claimants to the property, and admittedly such disputes must be resolved by the condemnation court in determining the claimants' respective rights to compensation. *E.g.*, *Eagle Lake Improvement Co.* v. *United States,* 160 F. 2d 182 (C.A. 5), certiorari denied, 332 U.S. 762; *National Refining Co.* v. *United States,* 160 F. 2d 951 (C.A. 8). While such cases may, as the court below suggests (R. 470), take the form simply of a litigation over the distribution of the fund, they are no more than a particular application of the principle that each claimant must establish his right to compensation.

When the dispute over title is between a private claimant and the Government, the principle is no different. The question remains one of determining whether the claimant has any interest in the property, and it is essentially irrelevant whether the interest he

claims would otherwise be in the Government or in someone else. Thus the precise issue in this case was whether respondent had any interest in the property for which he was entitled to be compensated—a question inevitably involved in any condemnation proceeding and which, we submit, must always be determined before compensation can be awarded.

While less common than disputes between private claimants, disputes over right or title between a claimant and the Government in condemnation cases are not infrequent. Yet we know of no case, not governed by state law—other than the decision below—holding that the Government could not assert its title, and have its claim decided, in the condemnation proceeding.[7] The question seems seldom even to have been

[7] The cases relied upon by the court below are not in point. Only two of the federal decisions cited (R. 471) involved condemnation proceedings. The first of these, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, 171 (C.A. 7), certiorari denied, 302 U.S. 714, was an earlier decision of the court below and contained only a statement that *under Wisconsin law*, which at that time was deemed controlling, a condemnor was required to allege the defendant's title and was bound by that allegation. Even that statement was apparently no more than dictum, since the court went on to show that the Government had, at the trial, made no claim of ownership to the land but had "tacitly acquiesced" in the defendant's claim and that the defendant had in any event adequately established its title. In the second case, *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, 855 (C.A. 5), the court held simply that, in taking an adjacent landowner's riparian rights by condemning in fee the bed of a river, the Government had taken *more* than its dominant servitude over navigable waters and was thus required to pay for what it had taken. To the extent that it is relevant at all, the decision is, in fact, contrary to that below, since the court considered and decided on the merits the Government's assertion of its existing rights in the river.

raised. In at least two courts of appeals, however, the question was expressly raised and discussed, and both are in direct conflict with the decision below.[8]

In *United States* v. *Turner*, 175 F. 2d 644 (C.A. 5), the United States had initiated a condemnation proceeding to acquire land which had once been submerged by navigable waters but which had been filled in by the adjacent landowner, Turner. The United States alleged that the submerged land originally belonged to the state; that the state had deeded it to the United States; that Turner acquired no interest by filling it; and hence that Turner was entitled to no compensation. The district court upheld Turner's title and granted compensation. The court of appeals reversed, holding that title to the filled land was in the United States, but remanded for a determination of what part of the land was fast land. Judge Waller, dissenting in part, argued that the suit, initiated to acquire title by condemnation, had been converted into "a suit to try title" and that the purpose of "confirmation of a title that it already owns seems to me to be so utterly and violently inconsistent with proceedings in eminent domain as not to be permissible" (p. 649). He noted that the Federal Rules were not then applicable (though they are now) and that there was no law or rule permitting "joinder of

[8] While both cases were decided before Rule 71A was adopted, they were decided as a matter of "general" law, as it were, without reference to the particular rules of the local jurisdiction. Inasmuch as the Federal Rules do not deal specifically with the problem, and certainly do not in any way contract the permissible scope of condemnation proceedings, these cases would seem clearly to be valid as precedents.

actions so inconsistent as to be repugnant" (*ibid.*). He further argued that, even if the action was permissible, the burden ought to be on the Government to prove title, as it would be in a suit to try title.

The case thus posed precisely the same issue as that in this case. The majority of the court, however, unlike the court below, expressly rejected Judge Waller's argument (pp. 648–649):

> I do not agree that the nature of this suit as a condemnation suit has ever changed. * * * The primary object was attained of getting immediate and undisputed possession. Any right or title of the United States was not waived, but the United States, I think, stood like any other claimant of the pledged fund. [*] Turner, Alabama and the United States had initially the same burden of identifying what land or interest, if any, each owned. Neither had any presumption as against the other. It did not become a suit in ejectment, or trespass to try title, but remained a condemnation suit with a problem to be solved as to whose land had been taken, the burden being on each claimant to identify his land. The burden of course may shift as the evidence progresses.

The other decision expressly considering the issue is *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C.A. 1), certiorari denied, 329 U.S. 718. The United States had in 1921, under special statutory authority, leased to defendant's predecessor

[*] There was in fact no fund deposited: "While no money was paid into court, the credit of the United States was substituted by the statutes applicable" (p. 648).

for 999 years part of a military reservation in Puerto Rico. The lease, as required by the statute, reserved to the United States the right to "free and unlimited use, without cost," of the land during a national emergency. Upon the outbreak of World War II, the United States asserted its right to use the land, but the defendant claimed that the reserved right had been terminated by a Presidential Proclamation in 1929 (which had conveyed the reversionary interest in the property to the People of Puerto Rico). The United States filed a complaint seeking to acquire by condemnation the "temporary use and occupancy" of the land for the duration of the war, but asserting the right to that use under the original lease. The court of appeals, in an opinion by Judge Magruder, noted the unusual feature of the complaint in that the United States was claiming an existing right to the very use it sought to condemn, but said (p. 83):

> * * * The validity of its claim to the right of free user might be tested by a complaint for a declaratory judgment or by a bill for specific performance of the provisions of the Baker lease, or by some appropriate possessory action. In its petition the United States asked in effect for an adjudication that its right reserved in the Baker lease was valid and subsisting and entitled it to the wartime use and occupation of the premises for naval purposes without compensation to the various persons holding subleases derived from Baker; and, in the alternative, if that claim should be denied, it asked for a judgment condemning an interest in the tract and determining the amounts of just com-

pensation payable to the various respondents named in the petition. Under the peculiar circumstances, there was much good sense in combining these alternative and mutually exclusive theories in a single proceeding, and we are not prepared to say that the procedure followed was inappropriate.

The court then held that the United States was entitled to use of the land under the lease without compensation and directed entry of a judgment so declaring.

Other decisions which conflict in result with the decision below, though the issue was not expressly discussed, are noted in the margin.[10]

b. In addition to being inconsistent with cases directly involving contested issues of right or title, the decision below is based on a misconception of the underlying nature and purposes of condemnation proceedings. The court assumes that a condemnation

[10] *Wittmayer* v. *United States*, 118 F. 2d 808 (C.A. 9): A complaint condemning property patented to defendant and the subsequent accretions thereto from the Missouri River was later amended to allege that the accretions were in the public domain and did not belong to defendant. The issue of title to the accreted lands was tried to the court, which entered judgment quieting title in the United States. The court of appeals affirmed.

United States v. *10,345 Acres of Land*, 50 F. Supp. 470 (E.D. Wash.): In a condemnation proceeding against land claimed as a homestead, the Government was allowed to show that the claimant had failed to make improvements within the time required in order to perfect his homestead title and hence that his inchoate title, being subject to cancellation of his entry at any time, was worthless. The court rejected the claimant's argument, analogous to that of the court below, that the Government was "bound by its deposit [of the estimated value of

proceeding is proper only to take some person's identified interest in property and that the initiation of the action thus necessarily "proclaims" the existence of such an interest. "A condemnation proceeding," however, "is an action *in rem*. It is not the taking of rights of designated persons, but the taking of the property itself." *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (C.A. 5), certiorari denied, 332 U.S. 762. For that reason the condemnor is not "called upon to specify the interests that happen to exist." *Duckett & Co.* v. *United States*, 266 U.S. 149, 150–151.

One of the most frequent uses of condemnation, indeed, is simply to perfect a title otherwise acquired—*e.g.*, where the Government agrees to purchase property at an agreed price and then condemns it in order

---

the land] and is estopped from contesting defendant's right to secure at least the amount deposited" (p. 472).

Tennessee v. *United States*, 256 F. 2d 244, 256–257 (C.A. 6), is an analogous case demonstrating the flexibility in the use of a condemnation action to permit a federal project to proceed, by the grant of immediate possession, while the rights of the several parties are reserved for determination on the issue of compensation. The state had acquired in fee and deeded to the United States the right-of-way for a highway. A telephone company claimed a permanent easement over the right-of-way for its existing telephone line, while both governments contended that the company had only a permissive right and was required, under state law, to relocate its line so as not to obstruct the highway. To resolve the issue, the United States initiated a condemnation proceeding to condemn all interests in the land that it did not already possess. Without question, the United States was allowed to assert (successfully as to part of the line) both its and the state's rights to require relocation of the line without compensation.

to acquire perfect title. In such cases, there is no need for condemnation to acquire the known interest—the conveyance of which has already been agreed upon—and the sole function of the proceedings is to perfect the title against unknown interests: the "authority of the court is invoked * * * to acquire good title." *Danforth* v. *United States*, 308 U.S. 271, 282–283; *United States* v. *Carmack*, 329 U.S. 230, 239; *United States* v. *Certain Land*, 345 U.S. 344, 348.[11] That use of condemnation proceedings has, moreover, been expressly approved by Congress. Thus, for example, 40 U.S.C. 255 provides that if land to be acquired does not exceed a stated value:

> * * * the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary * * *.

In all such cases, the Government is in effect condemning its own property to cut off possible outstanding interests which may or may not in fact exist, and in doing so it clearly does not "concede" the existence of any interest for which compensation must be paid. In this case, condemnation is being used for essentially the same function—to perfect the Government's title against the disputed claim of respondent—and

[11] See also, *e.g.*, *Albrecht* v. *United States*, 329 U.S. 599; *Mahowald* v. *United States*, 176 F. 2d 509 (C.A. 8); *Scott* v. *United States*, 161 F. 2d 1009 (C.A. 6); *United States* v. *Two Acres of Land, etc.*, 144 F. 2d 207 (C.A. 7).

we see no more reason why the initiation of the action here should be deemed an admission of the validity of the claimed interest than it is in other cases.[12]

II

THE LEASE WAS SUBJECT TO REVOCATION IN ORDER TO USE THE PROPERTY FOR AN ARMY MISSILE BASE

A. INTRODUCTION

The second question presented is one of construction of the lease and, more importantly, of the leasing statute—*i.e.*, whether the Government had a right to revoke the lease to use the property for a missile base. If it did, then, on the one hand, the revocation was valid and respondent had no interest in the property. On the other hand, even if there had been no previous revocation (or, as the court below held, the Government was estopped to assert it), the existence of the *right* to revoke the lease for that purpose would have made the respondent's interest of no substantial value. At the date of the taking, it was known that the Government needed the property for a missile base and hence known that, had there been no condemnation, the Government would have promptly exercised its right to revoke the lease. If the Government had that right, respondent's defeasible interest

[12] Also analogous are the cases holding that the Government, in condemning property on which it has erected improvements as a lessee, is not required to pay just compensation for the improvements, *e.g.*, *Searl* v. *School District, Lake County*, 133 U. S. 553; *Bibb County* v. *United States*, 249 F. 2d 228, 230 (C.A. 5). In essence, these cases allow the Government to assert an existing interest in the improvements notwithstanding its condemnation of the property.

was worth only the value of the use of the property during the 60-days' notice that would be required for the exercise of that right—simply a reasonable period in which to vacate the premises, and of no significant value. Thus the question of the scope of the right of revocation is the same whether or not the prior revocation is to be given effect. In short, under our view of the lease and statute, either respondent had no interest in the property (because of the prior revocation) or the defeasible interest it did have was of no substantial value (because of the impending revocation).

The court below held, however, that the lease could be revoked only upon a determination that revocation was "essential for aviation purposes".[13] That hold-

[13] Both courts below, having held that the prior revocation could not be asserted, dealt with the question solely in terms of the effect of the right of revocation on the value of the remaining term of the lease. The district court instructed the jury that the right could be exercised solely for "aviation purposes" and that use of the property as a missile base was not such a purpose (R. 421). Since the evidence disclosed that there was no existing need of the property for "aviation purposes" as thus limited (*e.g.*, R. 432–434), there was, under that construction, little likelihood of the lease being revoked before expiration of the remaining term (2 years and 8 months), and the jury clearly so concluded.

The court of appeals held that the right to revoke was exercisable only "for aviation purposes" but thought it unnecessary to decide whether use of the property as a missile base was within such "purposes" (R. 475). However, since use as a missile base presented the only practical likelihood of the lease being revoked and the jury had obviously based its verdict on the instruction that the lease could not be revoked for that purpose, it was clearly error to affirm the judgment without considering that question.

ing, we submit, was based on an erroneous interpretation not only of the lease itself but also of the authorizing statute.

B. THE REVOCATION WAS AUTHORIZED BY THE TERMS OF THE LEASE

The sole basis for the court's interpretation of the lease was the recitation in its preamble that "it is considered essential that the said airfield * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities."[14] On its face, however, that statement was simply a recital of the justification for the Department's keeping the property in a stand-by status (by leasing it) rather than declaring it surplus and disposing of it. Under the Surplus Property Act of 1944, in effect when the lease was entered, each military department was required to dispose of any property determined to be "surplus" to its needs. See §§ 3(e), 4, 11, and 23, 58 Stat. 765, 767–769, 777. Thus to justify leasing property not required for immediate use, instead of disposing of it, it was necessary to determine that the retention of the property for future use was essential—a requirement expressly referred to in the new leasing statute passed only a few months after the lease was executed. See Act of August 5, 1947, *supra*, p. 2. The quoted "Whereas" clause was, we submit, included in the lease solely to satisfy that require-

[14] All the relevant parts of the lease are set forth in the Statement, *supra*, pp. 4–5.

ment and was in no way directed to the scope of the reserved right of revocation.[15]

The revocation clause itself (¶ 14), in turn, imposes no limitation of "purpose" but provides, without qualification, that the lease shall be "revocable at will * * * in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential." The answer to the court of appeals' question, "essential for what?" (R. 473), if one is needed, is to be found not in the unrelated recitals of the preamble but in the directly analogous provision in paragraph 1 that the lease could be renewed for an additional term only if the Secretary found that the property was "not essential for governmental purposes only." The absence from paragraph 14 of the qualifying phrase "for governmental purposes only," whatever its explanation, cannot mean that the power of revocation in paragraph 14 was to be narrower in scope than the power to deny a lease extension under paragraph 1. In view of the complementary nature of the two powers and the substantial identity of their purposes—both being means to recover the property when needed—the most reasonable inference is that they were to be of the same scope. Finally, the fact that *respondent* also was given a totally unlimited power to terminate the lease "at any time" (¶ 1) removes any reason of fairness for reading into the Government's revocation power

[15] In any event, recitals in a preamble are of weight only if the operative provisions are ambiguous and the recitals clear (*e.g.*, *Kogod* v. *Stanley Co.*, 186 F. 2d 763, 765 (C.A. D.C.); *Wilson* v. *Towers*, 55 F. 2d 199, 200 (C.A. 4)), and the opposite is the case here.

any limitation not made express. In our view, therefore, the lease was by its terms revocable for any governmental purpose, and thus could be revoked in order to use the property as a missile base.

It is immaterial that the property was under the jurisdiction of the Navy when the lease was made, while the lease was revoked in order to permit the Army to use the property. The lease was with the "United States," not with the Navy, which has "no separate existence as a legal entity." *Ann Arbor Transp.* v. *United States,* 93 F. Supp. 341 (E.D. Mich.). Nor can the authority for the internal transfer of the property from the Navy to the Army be questioned. See, *e.g.,* 63 Stat. 384, 40 U.S.C. 483(c). The determination that the revocation was "essential" was made by both Secretaries and thus necessarily satisfied the requirements of paragraph 14. That the Secretary of the Navy may have acted at the behest of the Secretary of the Army is likewise immaterial. Cf. *Phillips Petroleum Co.* v. *Johnson,* 71 F. Supp. 791, 792 (D.D.C.).

C. THE LEASE WAS REVOCABLE UNDER THE AUTHORIZING STATUTE

However the terms of the lease itself might be construed, the lease would nevertheless be revocable under the terms of the governing leasing statute. The leasing statutes are unequivocal in requiring that leases thereby authorized be revocable "at any time." The Act of August 29, 1916 (*supra,* p. 2), authorized the Secretary to lease property "for periods not exceeding five years and revocable at any time." The Act of August 5, 1947 (*supra,* pp. 2–3) provided that

each lease "shall contain a provision permitting the Secretary * * * to revoke the lease at any time." It then provided that the revocation provision might be omitted upon a "public interest" determination but that "In any event each such lease shall be revocable by the Secretary * * * during a national emergency."[16] Since the two Acts are substantively the same in all aspects relevant here, it is unnecessary to decide whether the instant lease is controlled by the 1916 Act, in effect when the original lease was executed, or by the 1947 Act, in effect when the lease was renewed for an additional five-year term.[17]

Any right of revocation required to be reserved by the authorizing statutes would, of course, be binding upon lessees taking under them. See, *e.g., Todd Dry Dock & Constr. Corp.* v. *Sumner Iron Works,* 289 Fed. 217, 220 (C.A. 9), certiorari denied, 263 U.S. 700. The right of revocation during a national emergency provided by the 1947 Act, moreover, does not even in form require a revocation provision to be included in the lease, but is operative of its own force.

[16] No claim is made that the Secretary of the Navy made the "public interest" determination necessary to omit the required provision, but since the revocation was during a national emergency it would make no difference in any event.

[17] If the renewal were pursuant to a binding option in respondent, arguably the 1916 Act should govern. However, since the 1916 Act prohibited leases exceeding five years, it would seem that the extension could be given effect only as a new agreement between the parties. The broad power of the Secretary to refuse the extension (see ¶ 1) also suggests that result. For these reasons, it is our view that the 1947 Act is controlling. As already noted, however, there seems no need to resolve that issue.

Thus, whatever scope is given to the right of revocation prescribed by the statutes is necessarily controlling here regardless of the terms of the lease.

Both statutes, in relevant part, provide simply that any leases so authorized are to be revocable "at any time." Language more direct, mandatory, or inclusive would be difficult to frame. That it was so intended is further indicated by the provision of the 1947 Act authorizing the inclusion in such leases of "a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof" (*supra,* p. 3). That provision necessarily contemplates that such leases may be revoked for the sole purpose of selling the property—that is, even without a public need for the property. See also *Hingham Management Corp.* v. *United States,* 166 F. Supp. 615 (C. Cls.), construing a revocation provision phrased in the exact language of the statute as being "absolute and unconditional."

Such a broad power of revocation is fully consistent with, and, indeed, required by, the purposes of the leasing statutes. The stringent restrictions on the leasing power of the military services is part of the underlying philosophy of requiring them to dispose of, rather than keep on hand or rent, any property that is surplus to their needs. They are not to become landlords managing permanent real estate holdings, but may keep only property which, if not needed for immediate use, may need to be promptly called into service within the foreseeable future. The purpose of the leasing authority was simply to pro-

vide an economical way of keeping essential defense facilities in a state of readiness, or "stand-by," until needed. The very justification for authorizing the retention and leasing of such facilities—*i.e.*, their potentially essential nature—also requires, however, that the Government have maximum flexibility in recalling them into service. The revocable lease permits an interim beneficial use of the facilities, effects their maintenance at minimum cost, and yet keeps them available upon call. The pervading concept, in short, to which the interests of lessees are necessarily subordinated, is the priority of temporarily dormant governmental needs. See, *e.g.*, S. Rep. No. 626, 80th Cong., 1st Sess., pp. 2–8; H. Rep. 623, 80th Cong., 1st Sess., pp. 1–6; 93 Cong. Rec. 9797–9799, 10,492.

In our view, therefore, the statutes, in requiring leases to be revocable "at any time," mean precisely what they say and respondent's lease was, therefore, revocable "at any time" regardless of any qualifications that might be read into the lease terms. Clearly, however, the lease ought to be construed so as to be consistent with the statute—as, indeed, its language seems to require. Under either approach, whether by interpretation of the lease or by force of the statutory commands, we submit that the revocation of respondent's lease in order to use the property for an Army missile base was clearly authorized.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed and that the case should be remanded to the district court with directions to enter a judgment denying compensation to respondent.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys.

MARCH 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959